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Jeanne Alexine Jenkins v. John Allen Jenkins and Veronica Jenkins : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

JEANNE ALEXINE JENKINS,
Plaintiff and Respondent,

vs.

JOHN ALLEN JENKINS and VERONICA JENKINS,
Defendants and Appellants.

Case No. 8276

RESPONDENT'S BRIEF

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AUTHORITIES CITED

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RESPONDENT'S BRIEF

Since we do not entirely concur in appellants' statement of the facts, we shall restate them as concisely as is consistent with our desire to give the court a complete view of the issues and of the questions involved for determination. For purposes of convenience, respondent shall be referred to as plaintiff and appellants referred to as defendants. Unless otherwise indicated, we shall refer only to the defendant, John Allen Jenkins, since, as indicated in defendants' brief (Pg. 1), the defendant, Veronica Jenkins, is only a nominal party.

FACTS

Plaintiff and defendant were formerly residents of San Diego County, California. While residing there, they ran into matrimonial difficulties and plaintiff filed a com-

plaint in the Superior Court of the State of California in and for the County of San Diego, (hereinafter referred to as the California court) seeking a divorce from the defendant and the custody of their two minor children involved in this action, to-wit: Theodore Scott Jenkins and Mia Jenkins. Defendant duly filed his voluntary appearance therein and waived further notice of the proceedings (TR. 4). Pursuant to the complaint of the plaintiff, an interlocutory decree of divorce was entered on the 9th day of March, 1953, granting to plaintiff a divorce and custody of said two minor children (TR. 4). Shortly thereafter, plaintiff, by reason of a physical injury, requested the defendant to take care of the children pending her recovery and on or about the 5th day of May, 1953, defendant did in fact take said two children. Thereafter, plaintiff recovered from her injuries and requested defendant to return the children to her. On or about March 20, 1954, defendant advised plaintiff that he had remarried and had no intention of surrendering custody of said two minor children. Whereupon, plaintiff instigated the present proceedings in the District Court of Salt Lake County, State of Utah, by filing her complaint for a writ of habeas corpus (TR. 1-3). Pursuant to the prayer of the complaint, a writ of habeas corpus was issued commanding the defendant to appear before the court and to bring with him said minor children (TR. 7). The hearing on the writ of habeas corpus came on regularly for hearing before the Honorable Judge Lewis Jones on the 22nd day of June, 1954, at which time the court made the following statement:

> "THE COURT: Gentlemen, the Clerk sent me the files and I've read the pleadings. I think I'll

require a statement of the theory of the parties, in the nature of a pretrial, before we commence, because this may or may not be able to be settled. I don't mean ultimately settled, but the matter of why the parties are here rather than down in the Superior Court of San Diego County is a very pressing thing to the court. Irregardless of *Cook* vs. *Cook* and other cases, I'd like to discuss the law before we take any evidence. I don't mean by that that we can settle the matter, but we might hurdle something" (TR. 21).

Pages 21 through 45 of the record on appeal discloses what transpired between counsel and the court pursuant to the foregoing suggestion and was termed by the court as pre-trial statements and oral stipulation of counsel (TR. 16). Pursuant to the discussions between court and counsel, the parties entered into a stipulation which was summarized by the court as follows:

> "THE COURT: Then to see if I can summarize this, the parties appear and make a pretrial statement and stipulate the matter may be continued, the court to retain jurisdiction of the children until such time as an order is obtained by either party. *That is, a new order from the Superior Court of San Diego.* That order could be either an order denying a petition to modify or granting a petition. And at that time, upon being advised of the action of the Superior Court of San Diego County, this court will then make its written order directing—or granting the writ if you prevail down in San Diego, and denying the writ if you prevail, Mr. Gustin. Is that the understanding now, so that the parties won't have to come back?" (TR. 44). (Italics added.)

Pursuant to said stipulation, the defendant filed a petition in the California court asking that court to modify the

original divorce decree and to grant to him the custody of said minor children. Both parties entered their appearance in said cause and were duly represented by counsel. On September 22, 1954, after a full hearing, said California court made and entered its Findings of Fact, Conclusions of Law and Order denying defendant's petition to modify said final decree of divorce and ordering the defendant to immediately return said children to the plaintiff on the grounds and for the reasons: "That Theodore Scott Jenkins and Mia Jenkins are of young and tender years, being approximately six and four years of age respectively; that it is for the best interests of said minor children that they be in the care, custody and control of their natural mother, the plaintiff, Jeanne Alexine Jenkins", and "That there has not been any change of circumstances sufficient to warrant a modification of the interlocutory and final decree of divorce with respect to the care, custody and control of said two minor children." (Pl. ex. 4, Pages 3 and 4.) Said California court also found as a matter of fact: "That the plaintiff Jeanne Alexine Jenkins has recovered from any physical or mental disabilities which may have existed during the period from February, 1953, to July, 1953; that said disabilities are not likely to reoccur; that the plaintiff is a fit and proper person to have the care, custody and control of the minor children, Theodore Scott Jenkins and Mia Jenkins (Pl. Ex. 4, Page 3).

Thereafter, defendant filed a notice of appeal to the Supreme Court of the State of California, which appeal is now pending. On October 7, 1954, in accordance with the stipulation entered into by the parties, plaintiff filed and served a motion requesting the District Court of Salt Lake

County to enter its order granting the writ of habeas corpus basing said motion upon the order of the California court (TR. 17-20). Said motion came on for hearing on the 14th day of October, 1954, before the Honorable Lewis Jones, who presided over the hearing on June 22, 1954.

Pages 57 to 85 of the record on appeal discloses what transpired between counsel and the court at that time. Defendant's counsel during the course of the discussion and in referring to the stipulation entered into by and between the parties on June 22, 1954, made the following statement: "This stipulation is a matter that is between Your Honor and myself. Your Honor's conclusion as to what was stipulated to is, of course, the last word so far as I am concerned and so far as my clients are concerned. I don't intend to let anybody else interpret or review the stipulation that was made between counsel and the court" (TR. 58). Thereafter, plaintiff introduced into evidence certified copies of the Findings of Fact, Conclusions of Law and Order of the California Court which were admitted without objection by defendant (TR. 64). Thereafter, the court gave defendant an opportunity of getting into the record such additional matters of evidence as he desired (TR. 73-74-75). Thereafter, the court, pursuant to the stipulation of the parties granted the writ of habeas corpus and forthwith returned said children to the plaintiff, but ordered, however, that she not leave the State of Utah until 12:00 o'clock noon, October 16, 1954, and not then if the Supreme Court of the State of Utah or any justice thereof ordered otherwise (TR. 52). Thereafter, defendant filed his notice of appeal to this court and filed a motion in the Supreme Court for an order staying the proceedings in the District Court

pending the determination of the appeal. The motion for a stay came on for hearing before the Honorable F. Henri Henriod, Justice of this court, in his chambers on October 16, 1954, at which time he entered an order directing the plaintiff to immediately return the children to the defendant and prohibiting either party from taking the children from the State of Utah pending the determination of this appeal.

STATEMENT OF POINTS

POINT NO. 1

THE ONLY JUSTICIABLE ISSUES EXISTING BETWEEN THE PARTIES WERE AT THE INSTANCE AND REQUEST OF THE DEFENDANT AND BY STIPULATION OF THE PARTIES WITH THE APPROVAL OF THE LOWER COURT REMOVED TO AND SUBMITTED FOR FINAL DETERMINATION BY THE CALIFORNIA COURT, WHICH COURT AT ALL TIMES HAD AND WILL CONTINUE TO HAVE JURISDICTION OVER THE PARTIES AND THE SUBJECT MATTER.

POINT NO. 2

THE JURISDICTION OF THE CALIFORNIA COURT HAVING BEEN VOLUNTARILY AND PROPERLY INVOKED BY THE PARTIES WITH THE APPROVAL OF THE LOWER COURT, THE CALIFORNIA COURT'S ORDERS AND DECREE ARE ENTITLED TO FULL FAITH AND CREDIT IN THIS STATE.

ARGUMENT

POINT NO. 1

THE ONLY JUSTICIABLE ISSUES EXISTING BETWEEN THE PARTIES WERE AT THE INSTANCE AND REQUEST OF THE DEFENDANT AND BY STIPULATION OF THE PARTIES WITH THE APPROVAL OF THE LOWER COURT REMOVED TO AND SUBMITTED FOR FINAL DETERMINATION BY THE CALIFORNIA COURT, WHICH COURT AT ALL TIMES HAD AND WILL CONTINUE TO HAVE JURISDICTION OVER THE PARTIES AND THE SUBJECT MATTER.

Plaintiff is in accord with defendant's statement in his brief, page 12, "That the best interest and welfare of the children is the controlling factor and is the rule adopted by this court in child custody cases when not controlled by statute." We contend, however, in answer to his question: "Has the rule been applied and followed in the instant case?" that it has.

There is no question but that the California court has and at all times will continue to have jurisdiction over the parties and the subject matter (27 C. J. S. 322(c) page 1246, 27 C. J. S. 333(c) page 1299; *Sampsell* vs. *Superior Court* (Cal.), 197 P. 2d 739). Nor is it disputed that the best interest of said children would be served by invoking the California court's jurisdiction as evidenced by the statement of defendant's counsel made during the course of the proceedings held on June 22, 1954, to-wit: "Now, I can

see, Your Honor, that the orderly sensible, practical thing to do would be for these parties to go down to California where the court had jurisdiction of the matrimonial domicile of the parties" (TR. 33), and again: "There is another fact, Your Honor, looking at the best interests of the children. It isn't to their best interests that a record be made that is so fleeting and temporary in this court of the kind that will have to be made. It ought to be down there in the California court" (TR. 35).

Because the lower court (TR. 35) and the plaintiff (TR. 45) were of the same opinion, the parties entered into a stipulation, the effect of which was to submit the justiciable issues existing between the parties to the California court for a final determination. The parties having submitted themselves to the jurisdiction of the California court, they are now bound by its order denying the petition of defendant to modify the decree of divorce. As we read defendant's brief, he does dispute this contention, but merely contends that the applicable rule of law in California is: "A perfected appeal in an action for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of the appeal" (Defendant's Brief, Page 14). Plaintiff agrees with defendant that the foregoing is the rule of law applicable to child custody cases in the State of California, but we cannot agree with defendant in his application and interpretation of the rule as he would have this court apply it to the facts of this case.

In the more recent case of *Ex parte Robelet* (Cal.), 263 P. 2d 486, the wife was granted a final decree of divorce

from the father and awarded custody of their two minor children, ages 11 and 10. She did not take physical custody of the children because of a serious physical and mental illness and upon the advice of her physician. While the children were in the physical custody of the father, he applied for and obtained an order modifying the custody provisions of the original decree granting to him the physical custody of the children with visitation rights granted to the mother. Shortly thereafter and while the children were with the mother under the visitation provisions of the modification order, she applied for an order to change the custody of the children to herself. Following a hearing on her application, the court further modified the custody provisions of the decree and awarded the physical custody. of the children to the mother. The father immediately filed a notice of appeal and pending said appeal filed a petition for habeas corpus in the Supreme Court of the State of California contending that his appeal stayed the last modification order, and that, therefore, he was entitled to custody of the children pending the appeal. The matter was referred to the District Court of Appeal, Second District, Division One, California, by the Supreme Court. The District Court of Appeals reaffirmed the rule of law quoted by the defendant in his brief (Page 14) and further held: "At the present time there is no showing that the children may not safely remain with the father pending the appeal. By reason of the foregoing, it is ordered that the children be delivered to the petitioner (father), who, pending determination of the appeal, is entitled to the custody pursuant to the terms of the Superior Court order of October 3, 1952," which order was the first modification order

granting to him custody of the two minor children. Thus, applying the rule of law of *ex parte Robelet*, supra, plaintiff is entitled to the custody of the two minor children pending the appeal in California by reason of the terms of the final decree of divorce entered by the California court on March 9, 1954 (TR. 6), and, therefore, the District Court of Salt Lake County, in granting the writ of habeas corpus and delivering the physical custody of the children to the plaintiff forthwith, gave effect to the stipulation and intent of the parties and committed no error in the absence of any allegation or evidence offered on behalf of the defendant to show that the best interest of the children was not thereby served.

POINT NO. 2

THE JURISDICTION OF THE CALIFORNIA COURT HAVING BEEN VOLUNTARILY AND PROPERLY INVOKED BY THE PARTIES WITH THE APPROVAL OF THE LOWER COURT, THE CALIFORNIA COURT'S ORDERS AND DECREE ARE ENTITLED TO FULL FAITH AND CREDIT IN THIS STATE.

The parties having rightfully and properly submitted themselves to the jurisdiction of the California court, which court has and at all times will continue to have jurisdiction over the parties and the subject matter, and that court having found:

> "8. That the plaintiff, JEANNE ALEXINE JENKINS, has recovered from any physical or mental disabilities which may have existed during the

period from February, 1953, to July, 1953, that said disabilities are not likely to reoccur; that the plaintiff is a fit and proper person to have the care, custody, and control of the minor children, THEODORE SCOTT JENKINS and MIA JENKINS", and

"9. That THEODORE SCOTT JENKINS and MIA JENKINS are of young and tender years, being approximately 6 and 4 years of age, respectively; that it is for the best interests of said minor children that they be in the care, custody, and control of their natural mother, the plaintiff, JEANNE ALEXINE JENKINS", and

"10. That there has not been any change of circumstances sufficient to warrant a modification of the Interlocutory and Final Decrees of Divorce with respect to the care, custody, and control of said two minor children", and

"11. That the minor children, THEODORE SCOTT JENKINS and MIA JENKINS, should be immediately returned by defendant to the home of the plaintiff in San Francisco, California." (Plaintiff's Exhibit 4, Pages 3-4.)

Its order entered on the 22nd day of September, 1954 (TR. 19), ordering the defendant to immediately deliver said minor children to the home of the plaintiff is entitled to full faith and credit in this state in the absence of any facts or conditions arising subsequent to the date of the decree which would justify a change in the interest of the children (*Sampsell* vs. *Holt,* 115 Utah 73, 202 P. 2d 550). The defendant having been given the opportunity to offer any evidence he desired as to why the California court's order should not be enforced (TR. 67, 73, 75), and having failed to show or allege any change in circumstances since the

entry of the California court's order on September 22, 1954, the rule of law of *Sampsell* vs. *Holt*, supra, was binding upon the lower court and, therefore, it was not error for said court to grant to plaintiff the immediate custody of said children.

CONCLUSION

Plaintiff respectfully submits that the appeal of the defendant should be forthwith dismissed and the order entered by the Honorable F. Henri Henriod, justice of this court, be vacated and set aside, and that the defendants be ordered to return the custody of said two minor children to the plaintiff in conformity with the order of the District Court of Salt Lake County, State of Utah, and the decrees and order of the Superior Court of the State of California in and for the county of San Diego.

Respectfully submitted,

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